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Public Prosecutor v Ahmad Rizal bin Umar

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HIGH COURT (KOTA KINABALU) — CRIMINAL APPEAL NO BKI-46–1/6 OF 2012
NURCHAYA ARSHAD J
25 JUNE 2020

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Criminal Law — Murder — Circumstantial evidence — Accused was police officer who charged with murder under s 302 of the Penal Code — Accused alleged murder committed by intruder — Whether totality of evidence pointed irresistibly to conclusion that accused committed murder — Whether defence lacked credibility — Whether contradictory statements by accused affected credibility of defence — Whether version of events by the defence was believable — Whether defence rebutted the finding of prima facie case

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The accused was a police officer who was charged with murder under s 302 of the Penal Code which was punishable under the same section. The charge against the accused was amended on 22 April 2013 and the accused claim trial. The accused was acquitted at the High Court at the end of the prosecution's case and this decision was affirmed by the Court of Appeal. However on appeal to the Federal Court, the acquittal was reversed and the accused was ordered to enter his defence and the matter was remitted to the High Court as the Federal Court ruled that there was a prima facie case against the accused. The prosecution's case was that the cause of death of the deceased was a stab wound to the chest which caused severe injury to the lung and heart and was confirmed by PW3 who conducted a clinical examination and PW2 who conducted the post-mortem. The evidence of the prosecution was wholly circumstantial and the Federal Court was satisfied that the total effect of the evidence lead to the irresistible inference and conclusion that it was the accused who had committed this crime. The presence of the accused at the scene of the crime was undisputed and there was insufficient evidence to show that a third party was involved. The motive of the killing was a purported triangular love affair between the deceased and the accused and PW12. During his defence, the accused gave sworn evidence and called a pathologist ('DW2') as a witness. The accused confirmed that he had an intimate relationship with the deceased but at the same time, they also had intimate relationship with other persons. The accused admitted the triangular love affair but stated it did not cause any jealousy, arguments or hard feelings among them except for his first wife. The accused in his evidence stated that during the incident the deceased and himself were woken up by loud banging noises coming from the door where he noted a man slamming open their bedroom door, and attempted to stab him with a knife, he was stabbed twice in the back and then the assailant also attacked the

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deceased in the bedroom. The assailant then further attacked him, the accused then stated that he saw the deceased dashing out from the bedroom into the living room area and shouted 'sudah lah, sudah lah'where the assailant stopped attacking DW1 and made a quick step towards the sliding door and stabbed her chest about two to three times. The assailant grabbed a handbag and some other things and sprinted through the sliding doors and escaped. Because he was in injured he was unable to carry the deceased to seek help, he dragged himself to his car and drove to IPD Keningau to seek help where he was assisted by PW1 and Lance Korporal Kristin, where PW1 drove to the house of the deceased and PW1 and Lance Corporal Kristin carried the deceased into DW1's car and drove to the hospital. DW2 then gave evidence to refute the fact that the injuries sustained by DW1 were self-inflicted. DW2's findings suggested that the wounds found were not consistent with common sites for self-infliction and in essence corroborated DW1's version that he was also the victim of a robbery gone maniacal and that the accused was stabbed untuby the assailant. PW23 was recalled by the prosecution and further concluded that three pairs of wounds bear similar appearances and that if they were caused in a combating situation it would be more randomised and more determined to cause severe injuries. The issue to be determined by the court was to consider if the defence had rebutted the finding of a prima facie case.

Held, convicting the accused and sentencing him to death:

(1) It was clear to the court that the accused's need to change his mind as to the 'truth' that happened on the night of the deceased's death, would be the very reason for the 'infamous reputation' he wanted to avoid in the first place. The court found the accused's story inconsistent and flawed with discrepancies thus portrayed a behaviour of suspicious nature. Therefore, the court was in accord with the learned DPP's view and found the accused could not be be telling the truth in giving his reason for changing his initial version. His only intention was to cover-up his criminal act by distracting the police investigation from finding the truth of the matter (see para 53).

(2) It stood to reason that no intruder could possibly enter the house without having to force the padlock open or without using a master-key to open the grill door. Objectively, had the intruder used the master-key, which functions to unlatch any padlock likened to our present case, certainly the master-key would not be left behind to hang on the iron grill door. Therefore, based on these circumstances, there was no intruder present that incident night as alleged by the accused and the court was of the opinion the defence failed in their rebuttal of this issue. The evidence that the deceased ran towards the escape route but instead of making her escape she shouted at the two of them, the court found that it was a surreal mix of fact and fantasy (see paras 55–56).

(3) Having deliberated on the evidence in totality, the case depended entirely upon circumstantial evidence. The principle enucleated from the various given authorities pertaining to circumstantial evidence was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all the evidence leads to an irresistible conclusion that it was the accused who committed the crime with no other reasonably possible explanation. Therefore, in view of all the evidence taken together, it was sufficient to prove that the accused had inflicted the injuries on the deceased and caused her demise beyond reasonable doubt (see para 63).

(4) The court found the accused's sworn statement from the dock was nothing more than a mere denial as the narrative was conjectured by him. Based on a careful consideration to DW1's given evidence, his chronicle of the whole incident betrayed his conduct, which was inconsistent with the truth of the matter. A detailed reading analysis of the accused's situation as revealed by the accused's evidence found that the accused had self-tailored his evidence to portray that he, as well as the deceased were victims of an attack by a 'robber turned homicidal maniac'. In the whole factual situation of the case the court found staggering inconsistencies in his story line which questioned its truthfulness. The total conduct of the accused was incongruous with innocence. It was also contrary to the involvement of any third party. Looking at the evidence holistically, the action of the accused as well as the deceased and the assailant, amid only through the accused's evidence, manifested an irresistible inference of his design and misdeed to finish off the deceased. On the facts, the only plausible reason for the accused to have ascribed the death through a third party was to conceal his own wrongdoing, with hope that in so doing he could perhaps escape incrimination. The court was satisfied that the prosecution has proven all the elements of the charge preferred against the accused beyond all reasonable doubt and the defence had failed, on balance of probabilities, to rebut the finding of prima facie case (see paras 78–79).

[Bahasa Malaysia summary

Tertuduh merupakan seorang pegawai polis yang dipertuduhkan dengan bunuh dibawah s 302 Kanun Keseksaan yang dihukum dibawah seksyen yang sama. Pertuduhan terhadap tertuduh telah dipinda pada 22 April 2013 dan tertuduh telah memohon untuk dibicarakan. Tertuduh telah dilepaskan dan dibebaskan di Mahkamah Tinggi di akhir kes pendakwaan dan keputusan ini telah disahkan oleh mahkamah rayuan. Namun semasa rayuan di Mahkamah Persekutuan, pembebasan tersebut telah diterbalikkan dan tertuduh telah diperintahkan untuk memasukkan pembelaannya dan kes tersebut telah dihantar semula ke Mahkamah Tinggi kerana Mahkamah Persekutuan telah membuat dapatan bahawa wujud kes prima facie terhadap tertuduh. Kes

pendakwaan adalah bahawa punca kematian si mati adalah kecedaraan tikaman di dada yang menyebabkan kecederaan teruk kepada paru-paru dan jantung dan ini disahkan oleh PW3 yang menjalankan pemeriksaan klinikal dan PW2 yang menjalankan bedah siasat. Keterangan pendakwaan adalah berdasarkan keadaan dan Mahkamah Persekutuan berpuas hati bahawa kesan keseluruhan keterangan membawa kepada kesimpulan yang tidak boleh dibendung dan kesimpulan bahawa tertuduh telah melakukan jenayah ini. Kehadiran tertuduh di tempat kejadian tidak dinafikan dan tiada keterangan yang mencukupi untuk menyatakan bahawa wujud penglibatan pihak ketiga. Motif pembunuhan tersebut adalah satu cinta tiga segi antara si mati, tertuduh, dan PW12. Sewaktu pembelaannya tertuduh memberi keterangan bersumpah dan memanggil pakar patologi (DW2) sebagai seorang saksi. Tertuduh mengesahkan bahawa dia mempunyai hubungan intim dengan si mati tetapi, pada waktu yang sama mereka turut mempunyai hubungan intim dengan orang lain. Tertuduh mengakui bahawa cinta tiga segi tersebut, tetapi menyatakan bahawa ianya tidak menyebabkan apa-apa kecemburuan, pertelingkahan atau perasaan iri hati antara mereka kecuali isteri pertamanya. Tertuduh dalam keterangannya menyatakan bahawa, sewaktu kejadian si mati dan dirinya telah dikejutkan dengan bunyi ketuk yang kuat datang daripada pintu yang mana dia perhatinya seorang lelaki membuka dengan keras pintu bilik tidur, dan cuba untuk menikamnya dengan pisau, dia telah ditikam dua kali di belakang dan penyerang tersebut turut menyerang si mati di dalam bilik tersebut. Penyerang tersebut terus meneyrangnya, dan tertuduh kemudian menyatakan dia melihat si mati lari keluar dari bilik ke kawasan ruang tamu dan menjerit 'sudah lah, sudah lah' yang mana penyerang tersebut berhenti menyerang DW1 dan membuat langkah pantas terhadap pintu gelangsar tersebut dan menikam dadanya lebih kurang dua atau tiga kali dan melarikan diri. Kerana dia berada didalam keadaan cedera dan tidak dapat mengangkat si mati untuk mendapatkan bantuan, dia mengheret dirinya ke keretanya dan telah memandu ke IPD Keningau untuk mendapatkan bantuan yang mana dia telah dibantuk oleh PW1 dan Lans Koperal Kristin, yang mana PW1 telah memandi ke rumah si mati dan PW1 dan Lans Koperal Kristin telah mengangkat si mati ke dalam kereta DW1 dan memandu ke hospital. DW2 kemudian memberikan keterangan untuk menyangkal fakta yang kecederaan yang dialami oleh DW1 adalah tidak konsisten dengan tempat biasa untuk kecederaan yang dilakukan pada diri sendiri dan inti patinya menyokong versi DW1 bahwa dia juga merupakan seorang mangsa dalam kejadian rompakan yang menjadi gila dan tertuduh telah ditikam oleh penyerang tersebut. PW23 telah dipanggil semula oleh pendakwaan dan membuat kesimpulan lanjut bahawa tiga pasang kecederaan yang mempunyai rupa yang serupa dan sekiranya ianya dilakukan dalam satu keadaan bertarung ianya akan lebih rawak dan bertujuan untuk memberikan kecederaan serius. Isu untuk diputuskan oleh mahkamah adalah untuk menimbangkan sekiranya pembelaan telah menyangkal dapatan prima facie.

Diputuskan, mendapati tertuduh bersalah dan menjatuhkan hukuman mati:

(1) Ianya adalah jelas kepada mahkamah bahawa keperluan tertuduh untuk menukar fikirannya mengenai apa yang sebenarnya berlaku pada malam kematian si mati, adalah sebab sebenar reputasi terkenal yang dia ingin elakkan dari awal. Mahkamah mendapati cerita tertuduh tidak konsisten dan banyak kecacatan atas sebab wujud percanggahan oleh yang demikian menggambar perangan yang menimbulkan syak wasangka. Oleh yang demikian mahkamah bersetuju dengan pandangan DPP dan mendapati tertuduh tidak memberitahu perkara yang sebenar dalam memberikan sebabnya untuk menukar versi awalnya. Satu-satu niatnya adalah untuk menyorok kelakuan jenayahnya dengan menggangu siasatan polis daripada mendapati kebenaran perkara tersebut (lihat perenggan 53).

(2) Adalah masuk akal bahawa tiada penceroboh boleh memasukki rumah tersebut tanpa memaksa mangga tersebut dibuka secara paksa atau tanpa menggunakan kunci induk untuk membuka pintu gril tersebut. Secara objektif, sekiranya penceroboh menggunakan kunci induk, yang berfungsi untuk membuka apa-apa mangga seperti dalam kes ini, tentu kunci induk tersebut akan ditinggalkan untuk gantung di pintu besi gril tersebut. Oleh yang demikian, berdasarkan keadaan, tiada pencoroboh hadir pada malam tersebut seperti yang dinyatakan oleh tertuduh dan mahkamah berpendapat bahawa pembelaan gagal dalam menyangkal isu ini. Keterangan bahawa si mati melarikan diri terhadap laluan keluar tetapi tidak melarikan diri dan sebaliknya menjerit kepada mereka berdua, mahkamah mendapati bahawa ianya merupakan satu campuran yang suka untuk dipercayai antara fakta dan fantasi (lihat perenggan 55–56).

(3) Setelah menimbangkan keterangan secara keseluruhan, kes ini bergantung sepenuhnya kepada keterangan keadaan. Prinsip yang dinyatakan dalam beberapa otoriti yang diberikan berkaitan dengan keterangan keadaan adalah bahawa satu sabitan berdasarkan keterangan keadaan adalah dibenarkan disisi undang-undang sekiranya kesan keseluruhan keterangan membawa kepada kesimpulan yang sukar untuk dinafikan bahawa tertuduh telah melakukan jenayah tersebut dan tiada penjelasan lain yang munasabah. Oleh yang demikian, mengambil kira kesemua keterangan, adalah memadai untuk membuktikan bahwa tertuduh telah menyebabkan kecederaan kepada si mati yang menyebabkan kematiannya melampaui sebarang keraguan munasabah (lihat perenggan 63).

(4) Mahkamah mendapati bahawa keterangan bersumpah tertuduh dari kandang tidak lebih daripada penafian kosong seperti mana naratif yang direka olehnya. Berdasarkan penimbangan berhati-hati keterangan yang diberikan DW1, pembabadan kejadiannya mengkhianati kelakuannya,

yang tidak konsisten dengan kebenaran perkara tersebut. Pembacaan teliti analisa keadaan tertuduh sepertimana yang digambarkan oleh keterangan tertuduh mendapati bahawa tertuduh telah mereka sendir keternagnanya untuk menggambarkan bahawa dia dan juga si mati merupakan mangsa seorang perompak yang menjadi orang gila dengan kecenderungan untuk membunuh. Dalam keseluruhan keadaan fakta kes mahkamah mendapati banyak keadaan tidak konsisten dalam jalan ceritanya yang menimbulkan tanda tanya sama ada ianya benar. Kelakuan tertuduh secara keseluruhan adalah bercanggah dengan sifat orang tidak bersalah. Ianya juga bercanggah dengan kewujudan apa-apa pihak ketiga. Melihat kepada keterangan secara keseluruhan, pelakuan tertuduh dan juga si mati dan penyerang, walaupun hanya melalui keterangan tertuduh, mewujudkan satu inferens yang tidak boleh dinafikan bahawa rekaan dan kesalahlakuannya untuk membunuh si mati. Berdasarkan fakta, satu-satunya sebab yang masuk akal untuk si mati menyalahkan kematian tersebut melalui pihak ketiga adalah untuk menyorok pelakuan salahnya sendiri, dengan harapan bahawa dia mungkin dapat melarikan diri daripada dipersalahkan. Mahkamah berpuas hati bahawa pendakwaan telah membuktikan semua elemen pertuduhan yang dikemukakan terhadap tertuduh melampaui sebarang keraguan munasabah dan pembelaan telah gagal, atas imbangan kebarangkalian untuk mematahkan dapatan prima facie (lihat perenggan 78–79).]

Cases referred to

Hashim bin Mat Isa v PP [1950] 1 MLJ 94; [1950] 1 LNS 23, CA (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306; [1982] 1 MLRA 20; [1982] CLJ 130, FC (refd)
PP v Jitweer Singh a/l Ojagar Singh [2014] 6 MLJ 222; [2016] MLRAU 321, FC (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497; [1999] 4 AMR 4277, CA (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)
PP v Ahmad Rizal Umar [2014] 1 LNS 1425, HC (refd)
Piara Singh and Ors v State of Punjab 1977 AIR 2274, SC (refd)
Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (third party) [1984] 2 MLJ 202; [1984] 2 MLRH 265 (refd)

Legislation referred to

Criminal Procedure Code ss 112, 272E
Penal Code ss 300(c), 302

Mohd Khairuddin bin Idris (Deputy Public Prosecutor, Attorney General's Chambers) for the complainant.

Ram Singh (Rizwan Borhan, Kimberly Ye and Flavian Henry with him) (Ram Singh & Co) for the accused.

Nurchaya Arshad J:

INTRODUCTION

[1] The accused, Ahmad Rizal bin Umar, a police inspector attached to Keningau Police Station was charged with an offence of murder under s 302 of the Penal Code (Act 574) punishable under the same section of Act 574 which upon conviction, he shall be punished with death.

Amended charge

The amended charge reads:

> That you on the 29th day of September 2011, between the hours of 4:00am and 5:00am, in the house located at Lot 7, Phase 5, Taman Adika, Keningau, in the District of Keningau, in the State of Sabah, did commit murder by causing the death of one Kartini Binti Borhan (F) NRIC NO. 840512-12-50008) and that you have thereby committed an offence of punishable under section 302 of the Penal Code (Act 574) Laws of Malaysia.

CHRONOLOGY

[2] This amended charge was read to the accused on 22 April 2013, and the accused pleaded not guilty and claimed trial. At the trial, 25 witnesses were called by the prosecution to prove the charge against the accused. At the end of the case for the prosecution, the honourable J Tuan Chew Soo Ho (as he was then) at Kota Kinabalu High Court on the 22 July 2014 ruled that the prosecution had not made out a prima facie case against the accused and thus, the accused was discharged and acquitted. The full facts of this case and the reasons for the said judgment can be found in *Public Prosecutor v Ahmad Rizal Umar* [2014] 1 LNS 1425. Thenceforth, the prosecution appealed against the decision of His Lordship.

[3] The Court of Appeal ('COA') on 26 January 2016 affirmed the decision handed down by Justice Chew Soo Ho. Aggrieved by the said order of acquittal and discharge, the prosecution had then further appealed the case to the Federal Court ('FC') urging the reversal of the said order by COA.

[4] The FC finally on 21 March 2018, allowed the appeal by the prosecution, set aside the order of discharge and acquittal and ordered the accused to enter his defence under s 302 of the Penal Code and for the matter to be remitted before the High Court. In this instant, the FC determined that

there was a prima facie case for the offence of murder under s 302 of the Penal Code.

[5] The defence case commenced on 8 October 2018 at Kota Kinabalu High Court (1) before this court and it was concluded on 30 April 2019.

THE CASE FOR THE PROSECUTION

[6] The death of the deceased Kartini bt Borhan was pronounced by Dr Ooi Kok Min ('PW3') who had conducted clinical examination on the same at Keningau Hospital, on 29 September 2011 at about 5.30am. The deceased's death was further confirmed by Dr. Jessie Hiu ('PW2') who conducted post-mortem on 3 September 2011 at Queen Elizabeth Hospital Kota Kinabalu. PW2 also certified the cause of death of the deceased to be a stab wound on the deceased's chest. PW2 is a forensic pathologist and it was established that she is an expert whose expertise is undoubted and her curricular vitae containing her full qualification and experience was tendered in court as exh P4. She prepared a post-mortem report exh P5, containing the full report on the injuries sustained by the deceased which also explained the actual cause of death. Basically, there was one stab wound at the left side on the face, which was directed downward, one end of the wound was sharp and the other was blunt. Another stab wound was noted on the left front of the deceased's chest, which was also directed downward cutting the ribs, muscles, left lung, the covering of the heart and penetrated the heart through and through from the top right to the bottom of the heart. This caused severe injury to the lung and heart, and was the injury that caused the death of the deceased. It was so fatal that there was no chance of survival.

[7] There was also an incise wound on the front of the left forearm, with some minor injuries, bruises and abrasions on the chest, the left thigh, and the knees. These injuries did not cause any significant internal injury and no vital organs were involved. A knife was the probable sharp weapon used in the murder of the deceased. Based on the injuries suffered by the deceased, it was possible that the injuries were inflicted downward with the perpetrator standing behind the deceased. PW2 in her conclusion stated that the stab wound on the chest was sufficient in the cause of nature to cause death. The deceased was identified by the deceased's father Borhan bin Sulaiman ('PW6') on 30 September 2011 with the investigating officer, PW16 in attendance. It is established that Kartini bt Borhan's death had taken place.

[8] There is no dispute that the prosecution's evidence is wholly circumstantial. The Federal Court was satisfied that the total effect of the prosecution evidence led to the irresistible inference and conclusion that it was the accused who had committed this crime. The presence of the accused at the

scene of the crime, a house in which the deceased was a subtenant of the first room, was undisputed. There was insufficient evidence that there was a third party involved; a robber turned assailant who stabbed the deceased to her death as well as injuring the accused. This was substantiated by the medical expert opinion ('PW23') finding that the injuries sustained by the accused were self-inflicted; there was no third party involved but it was the fights between the deceased and the accused that caused the death of the deceased.

[9] The motive that led to the killing was merely because the deceased was having an affair with one Lim Guan Heng ('PW12') whose affair with the deceased came much earlier than the accused. The purported triangular love affair between the deceased and the accused on one hand and deceased and PW12 on the other continued to persist until the death of the deceased. PW2's evidence on the nature of the injury to the deceased's chest which resulted her death, when viewed objectively, indicates that the said injury was sufficient in the ordinary course of nature to cause death. When the deceased's heart was pierced through, death must be the probable and natural consequence. Hence, upon an objective investigation, the intention of causing such bodily injury to the deceased and the bodily injury inflicted being sufficient in the ordinary course of nature to cause death, would have satisfied the requirement of s 300(c) of the Penal Code.

[10] In this instant case, the Federal Court was tasked with determining whether a prima facie case had been established against the accused on the charge of murder. In this regard, the Federal Court was satisfied that the ingredients of the charge had been made out beyond all reasonable doubt. This was a purely prima facie case finding at the end of the prosecution case and as the Federal Court also pointed out, such a prima facie case would warrant conviction if the accused elected to remain silent (see *Public Prosecutor v Jitweer Singh a/l Ojagar Singh* [2014] 6 MLJ 222; [2016] MLRAU 321). Nevertheless, the finding of the Federal Court will stand only in the absence of contradictory evidence.

THE CASE FOR THE DEFENCE

[11] This was heard before me. In pursuit of the defence, two witnesses were called — the accused himself ('DW1') and a pathologist ('DW2'). The accused elected to give evidence on oath by way of witness statement (exh WS-DW1) and testified in court. They submitted that they will be relying on the following exhs WS-DW1, D1, D2, D7, D12 and P35.

[12] At the commencement of the defence case, this court under s 272E of the CPC suggested for visual convenience, a male and female mannequin, and a knife to be used for illustration purposes. Both the learned prosecution and

counsel for the defence readily agreed to such suggestion and two video cameras operated by Jeffrey Soon of Video Plus Production Kota Kinabalu, a professional videographer, were added to record the demonstration by the expert witnesses.

GENERAL BACKGROUND

[13] DW1 testified that he had joined PDRM since 2015 and was an experienced investigating officer attached to IPD Keningau (as he was then). He was at the material time married to Sariah bt Abdul Karim (his first wife). He declared that it was not a happy marriage, one devoid of sexual relationship though outwardly they appeared to be fine and behaved like any normal couple. Their predicament was due to their marriage being an arranged by their families.

[14] The accused in his defence confirmed that he had an intimate relationship with the deceased since February 2011. However, at the same time, both of them also had intimate relationship with other persons — the former still married and the latter with a boyfriend PW12. The accused admitted the triangular love affair, but stated that it did not cause any jealousy, arguments, or hard feeling among all of them except his first wife, who was aware of the accused's affair and obviously was not happy with the situation.

[15] In his statement exh D2 he declared that he has had an intention to divorce his first wife but insofar before the incident (18–23 September 2011) he had only sought advice and counselling from Jabatan Agama Islam. He also mentioned his intention to marry the deceased, premised on which, he visited the deceased's family during Hari Raya in August 2011. He alluded that the deceased was aware of this and in fact she had also told the accused that she will only end her affair with PW12 once the accused divorces his wife. The accused later testified in court that he did not confide his plan to the deceased.

[16] In his written statement (exh WS-DW1) the accused stated that since being intimate with the deceased beginning the month of February 2011, he visited her twice a week and by July 2011 their relationship became more serious and he mostly spent his nights with her. However, until the death of the deceased he was still married to Sariah but after this tragic incident he had divorced her and is now presently married to another with whom he has a child.

[17] In his statement (exh D1), on the night before the incident (28 September 2011) he went to the deceased's house around 9pm. He knocked on the deceased's bedroom window to signal his arrival to her, after which the deceased opened the sliding door and unlatched the padlock on the grill door

using a key for DW1 to enter. Upon entering the house, DW1 locked the grill door by using the same key.

[18] Both DW1 and the deceased entered her bedroom and discussed their plans for the night whilst watching television. DW1 told the deceased that he was going to Insp Jarraw's birthday party that night at Kelab Rekreasi Keningau (KRK) and invited her to come along, but the deceased turned down the offer. DW1 stated that he and the deceased then laid in bed watching television while she laid her head on his chest and massaged his head. Around 11.45pm, as DW1 was leaving for Insp Jarraw's birthday party, the deceased told DW1 to take the house key with him, which in DW1's opinion was as if she was hoping that he would return to her house after the party.

[19] At the KRK the accused met up with his friends and by coincidence his ex-girlfriend, Dell, and her cousin, Ita who were sitting at a different table. Later, together with his friend Insp Jarraw, he went to Dell and Ita's table and joined them and continued drinking alcohol. At the same time, he also saw Ling Ling who is the deceased's friend. He quickly send a text via SMS to the deceased about meeting Ling Ling at KRK and added that he felt bored and unhappy there ('Saya rasa bosan di situ dan tak tak happy').

[20] Yet, he kept on partying until about 1am, when he together with another friend named James, his ex-girlfriend Dell and Ita proceeded to pub hopping. They finally hit Borneo Pub and watched live band music until 2.30am. After that, DW1 sent Dell back home while James sent the heavily drunken Ita home. When DW1 finally left for the deceased's home, it was already around about 3.40am.

[21] On reaching the deceased's house he stopped and parked his car at a vacant space in front of the deceased's house and used the key given to him earlier to enter the house. Once inside he padlocked the grill door, went straight for the deceased's bedroom which was unlocked, and placed the house key on a table beside the television.

[22] He noticed that the deceased was still awake and was sitting on the mattress watching television. DW1 offered her some food and drinks which he brought back to the house but she declined. DW1 joined the accused on the mattress and apologised to the deceased for his lateness. DW1 revealed that the deceased was not angry with him. He stood up and took off his T-shirt and jeans, leaving on only his boxer shorts. DW1 recalled that while he was placing his trousers at the foot of the mattress, his wallet was still inside his trousers back-pocket. He then rejoined the deceased on the mattress, laid with her and she gently stroked his hair until he fell asleep.

DURING INCIDENT

[23] Suddenly they were rudely awakened by loud banging noises coming from the door. At that very instant, he consciously noted a man slamming open their bedroom door and barged into the room, dashed towards DW1's direction and attempted to stab him with a knife. He recalled that the assailant wore a cap and a sweater jacket. On reflex, he scurried to the living room but in so doing he felt two stabbings on his back (exh D12(2) and (3)). At the same time, the assailant also attacked the deceased in the bedroom but DW1 had no idea whether the deceased was injured or not. The assailant then attacked him and stabbed him on the right knee (exh D12(4)) and right shoulder (exh D12(6)). He also attempted to stab DW1 on his chest area (exh D12(7)) but DW1 managed to repel the knife by using his left hand, which resulted a slash injury on his left palm.

[24] DW1 testified that while he was scuffling with the assailant, he saw the deceased dashing out from the bedroom and into the living room area. DW1 also saw that the main sliding and grill doors were already opened, but the deceased did not run out of the house to escape. Instead, DW1 heard the deceased shouted: 'sudah lah, sudah lah'. Immediately, the assailant stopped attacking DW1 and made a quick step towards the sliding door where the deceased was standing and stabbed her chest about two to three times. The deceased fell supine on the floor and DW1 saw the assailant bending down towards the deceased with a knife in his hand aiming towards the deceased's neck. DW1 then shouted 'Kalau kamu merompak, kamu ambil lah semua barang disini dan jangan kasi mati dia'.

[25] The assailant briskly stood up and in double-quick time, he turned back towards DW1 and set upon to strike him again. DW1 who already had a proper sight of the assailant holding a steel kitchen knife in his left hand, quickly grabbed a small folding table nearby the bedroom door to shield himself against the assailant. The assailant in response grabbed a handbag and some other things and sprinted through the sliding doors and escaped through the open grill door.

[26] The accused said that this incident took place shortly before 4.50am. He knew this because after the assailant exited, DW1 dragged himself back to the bedroom, took his hand phones and noticed the time on it.

[27] The crux of DW1's evidence as related in this instant chronicle is DW1's version of events in relation to his injuries purportedly inflicted by the assailant.

AFTER THE INCIDENT

[28] After the assailant escaped, DW1 went back into the bedroom to put on his jeans trousers and noticed his wallet missing. He noticed his two hand phones and another one belonging to the deceased on the mattress, took all three of them and placed them in his pockets. He then tried to stand up but was unable to as his right leg was injured by the assailant and was too weak. He dragged his body ('mengengsot') with both hands out of the bedroom whilst keeping his injured right leg straight. In the living room he found the deceased gasping for life ('Tini dalam keadaan nyawa-nyawa ikan'). Due to his injuries, he was unable to carry the deceased to seek help. In excruciating pain from the homicidal attack, DW1 strived to drag himself from the deceased's house to get into his car and finally managed to drive off to IPD Keningau to seek help.

[29] Upon reaching IPD Keningau, the accused was assisted by Korp Jasni ('PW1') and Lance Korp Kristin. The accused moved to the back seat, whilst PW1 drove the car with Lance Korporal Kristin sitting in the front passenger seat. DW1 then led them to the deceased's house. Upon reaching there, PW1 and Lance Korporal Kristin entered the deceased's house and carried the deceased out into DW1's car before they drove to the hospital.

[30] Following DW1's evidence, the quest for rebuttal was intensified through the scientific evidence proffered by Dr Buhpinder Singh, an independent pathologist ('DW2') to reinforce DW1 storyline and refute PW23's finding adduced during the prosecution stage that the injuries sustained by DW1 were self-inflicted.

[31] DW2 was a Senior Consultant Forensic Pathologists with the Government of Malaysia until April 2018 when he retired. He had given evidences in various level of courts in Malaysia since 1983, in which all his evidences were accepted. The last time he evidence in court was in an inquest proceeding on 15 November 2018 in the Sessions Court, Penang in a murder case involving a case of stabbing. Currently, he is an Associate Professor at Royal College Surgeons, Ireland and University College Dublin, Malaysian campus. He is also the Forensic and Legal Medicine coordinator and head of department at the said campus.

[32] The prognosis by the prosecution's expert opinion witnesses' in their respective testimonies, reports and in addition the relevant photograph exhibits in this instant case have already been made available to DW2 earlier for his perusal, who of course was only engaged by the defence team after the Federal Court's ruling on 21 March 2018.

[33] DW2's finding suggested that seven wounds were found in DW1's

physique. DW2 opined that all the wounds were not self-inflicted, as the sites of infliction of the wounds were not consistent with the common sites for self-infliction especially at the back, at the right side of the neck and even at the right leg. DW2 disagreed with the conclusion arrived by PW23 and testified that the wounds were caused in combative situation between the assailant and DW1.

[34] The injuries are considered serious in nature as DW1 was sent for X-rays because any stab wound has the potential to cause extensive internal injury in the form of massive haemorrhage. However, DW2 agreed that the injuries inflicted on DW1's right side shoulder next to the neck (P13(11)) and on the left side of the back shoulder (P13(14)) did not hit any major blood vessels. He also concurred that although the wounds were serious in nature (5cm depth into the tissues), they are not life threatening. He corrected PW5's use of terminology that instead of being called lacerations, the injuries are actually slash/incise wounds.

[35] DW2 has made his observations on the injuries on DW1's right knee and lower right leg (exh P13(17)). The knee injury was quite bad, because it has totally cut two tendons; the infrapatellar (kneecap) tendon and the tibialis muscle. DW2 commented that he had seen knee injuries but they were not so deep so as to cut the tendons to incapacitate the movement of a person. These injuries on the knee are rarely seen in self-inflicted wounds. Still, according to PW5's testimony the laceration on DW1's right knee would still enable him to walk but with assistance like holding onto railing and walk with a limp on his uninjured left leg.

[36] The defence submitted that contrary to PW23's evidence, DW2 explained that there is no normal pattern of injuries caused in a struggle or assault as it depends on various factors like the movement of the individuals, the weapons used and the physical built of the individuals. Each case would have to be taken on its own particular details.

[37] In a nutshell, DW2's testimonies corroborated DW1's evidences that he was also a victim of a robbery gone maniacal. It was during the vicious attack by the assailant that DW1 received injuries and at some point of this mayhem, the deceased was stabbed to death by the assailant.

[38] The prosecution had recalled PW23 to rebut DW2's finding. PW2 was also recalled but only to emphasise using exhs D12 and D13 to show the place of injuries sustained by DW1 during the incident. The defence did not object to the recalling of these witnesses.

[39] PW23 on being recalled by the prosecution during the defence stage,

reiterated on the three pairs of injuries, as follows:

(a) the first pair of wounds on the potential life-threatening area of the body ie the right chest and right side of the ribcage are small and superficial. Looking at the morphology (a particular form, shape or structure) of these two wounds, it can be seen that they have similar appearance (exh P13(8 and 12));

(b) the second pair of wounds ie one on the right shoulder near the base of the neck exh P13(11) and the other one on the back of the left shoulder P13(14). They are longer incised wounds cutting the deeper structure that is up to the muscles. These two wounds also have a similar morphology and cutting deeper structure on non-life-threatening area of the body; and

(c) the third pair of wounds which is on the back of the body (exh P13 (15 and 16)) are similar in appearance; they are almost near parallel and almost the same level. These two wounds also have the same morphology.

[40] PW23 concluded that these three pairs of wounds bear similar appearances. On the other hand, if they were caused in combating situation, the wounds would be more randomised and more determined to cause severe injuries. PW23 opined that normally a person with 'some knowledge' would come out with these type of wounds by making subconscious pair. PW23 agreed that he had no knowledge of what transpired at the scene of crime when he gave his opinion. He based his opinion on the wounds on DW1 's body according to the case background given to him by the police who requested him to examine the patient and interpret the wounds.

[41] In the instant case, the pattern formed by these three pairs of wounds show that they were made in pairs subconsciously during the self-infliction of the wounds. To have even one paired wound patterns is not common in combat; what more when we have more than a pair such as in this case.

[42] The wound on the palm (exh P13(6)) shows the incised wound on the inner half of the left palm. This wound's location is a common area for defensive wound. However, if the three pairs of wounds were inflicted in life threatening situation, the wound in P13(6) cannot explain the degree of self-defence because this wound is not adequate to defend. It is very minimal even to be indicated as defensive wound.

[43] Photograph number 17 of exh P13 shows a curvilinear incised wound below the right knee cap. The upper inner end of this wound was joined by an oblique incised wound on the right knee cap. Both wounds were already sutured (p 3 of exh P39 the last bullet). PW5 in his report exh P21 mentioned this wound cut the infra patella tendon completely and tibialis anterior muscle

cut. PW23 opined that the location of this wound is not common for a defence wound. In fact this wound was relatively unusual if compared to the three-plus-one wounds mentioned earlier. This type of wound seldom occur singly in combative fight as it is isolated, unusual and has a high possibility of being self-inflicted in nature.

[44] PW23 disagreed that the injury on DW1's knee is serious enough so as to disable the him to walk. Even if the pain is severe, a normal person can still walk. It is not like the leg was totally cut off; here it is only a tendon cut. In his conclusion, looking at the seven other injuries on DW1's body, the three unusual pairs of wounds and the cut on DW1's left palm, PW23 concluded that the overall pattern of wounds on DW1's body leads to the inference that they are self-inflicted in nature. Even without the other seven wounds, PW23 stated that he would still interpret the wounds on the accused's right leg as possibly be self-inflicted.

[45] (The demonstration utilising male exh D12 and female exh D13 mannequins by DW2 (as well as PW2 and PW23) during the defence proceeding were only to assist all relevant parties to acquaint and appreciate the medico-ramification of the injuries of both the accused and the deceased. I must put on record here that whatever I have said or demonstrated during the process of using the mannequins during the trial does not in any way profile my immediate conclusion in this instant case, as they were only my observation. It was only a repartee of enquiries among the participating parties. It is a trite law that at the completion of the defence case the search for any reasonable doubt shall be conducted in totality at this juncture on the yardstick of maximum evaluation.)

DUTY OF THE COURT AT THE END OF THE DEFENCE

[46] There was already a prima facie case for the offence of murder under s 302 of the Penal Code in this instant case determined by the FC. It is therefore the duty of this court to consider if the defence had rebutted the finding of prima facie case. It is of course never the duty of the accused to prove his innocence. I am mindful of the principle laid out in the case of *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129 that the trial judge must have due regards to the findings and rulings of the Federal Court as if those findings and rulings had been made by the trial judge himself at the close of the case for the prosecution.

FINDINGS

[47] With the defence calling DW2 to rebut the finding of PW23 and PW23 being recalled during the defence, at the completion of this trial this

court is now faced with two conflicting sets of evidence which is the major issue which goes directly to the core of the charge made against the accused. On one hand, it is the PW23's finding that the accused's self-inflicted injuries suggest that there was no third party involved in the fight but only between the accused and the deceased which consequence the deceased's death. On the other end, the finding of DW2 that the injuries sustained by the accused suggest combative wounds which inferred that there was a third party involved in the fight with the accused.

[48] Both PW23 and DW2 had on numerous occasions given evidences on behalf of the prosecution which had always been accepted by the courts. In this matter I noted that I had to be contented with two divergent findings by these experts regarding the nature of injuries received by the accused. PW23 and DW2's observations of the bodily state of the accused were built on circumstantial evidences. I have also taken cognisance of the fact that in comparison to DW2, PW23 has had the advantage of conducting clinical examination on the accused even though it was after more than a year from of the date of the incident.

[49] Now, faced with conflicting expert opinions, on what basis should the court decide which opinion to accept? It is trite law that a judge should test it against the background of all other evidence available in that case to decide which expert evidence is to be preferred. In other words, a judge must not consider expert evidence in a vacuum in the sense that the same should not be artificially separated from the rest of the evidence (see *Public Prosecutor v Jitweer Singh a/l Ojagar Singh* [2014] 6 MLJ 222; [2016] MLRAU 321; *Singapore Finance Ltd v Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (third party)* [1984] 2 MLJ 202; [1984] 2 MLRH 265; *Piara Singh and Ors v State of Punjab* 1977 AIR 2274).

[50] I did a detailed reading analysis of the accused's situation during the incident as well as prior and after the incident as revealed by the accused's evidence and tested it against the prosecution's case. As such, these are the available background of all other evidences in this case:

[51] It has been the prosecution's case that the accused's evidence was flawed from the out-set. *First and foremost*, the accused's two sets of self-contradictory statements did raise an eyebrow as to his credibility:

(a) the accused had recorded two separate statements exh D1 and D2 (under s 112 of the Criminal Procedure Code on 5 October 2011 and 11 October 2011 respectively) to the police which contradicted his own police report (exh P35) and earlier statements to PW1, PW4, PW5 and PW8. In his earlier statements the accused consistently maintained that he received a distress call from his female friend, (Kartini/deceased) that

a robber had broken-into her house. He then rushed to her house and upon reaching there, he witnessed the deceased struggling with the robber. He leaped to her rescue which later resulted in both of them getting wounded, which consequence Kartini's death. This was the version that the accused adopted whenever he was asked and also later in his police report (exh P35);

(b) another discrepancy was in DW1's initial statement taken by PW16 on 2 October 2011, which corresponded with exh P35 but contradicted with exh D1 and D2). Upon investigation, PW16 found that the accused had been at the deceased's premise earlier than he claimed and through his statements D1 and D2, he was indeed with the deceased on the morning of the crime incident;

(c) in any event, the issue of the existence of an intruder remained in all the evidences of DW1. Both versions contained the allegation that the said intruder broke-in and force-opened the grill and the sliding door of the house. All the same, the accused confirmed and maintained that his injuries were caused by the intruder and not self-inflicted as alleged by the prosecution. Yet, during the police investigation there was no evidence of any break-in to the house;

(d) PW16 testified in court that as the investigation into the case progressed, he discovered the discrepancies in the accused's version of the crime incident becoming more and more apparent. This was when the accused was made a suspect because his earlier version of events was no longer believable;

(e) the prosecution submitted that the version given in P35 was intentionally fabricated to cover the accused's killing the deceased from the police because DW1 knew that there were no independent eyewitnesses in the case. Not only was it improbable for any intruder to enter the house without the grill being force-opened or without any sign of break-in, the photo fit identification of the intruder by DW1 was also imaginary and does not exist at all. Comprehensively, there was no intruder on the morning of the incident except for the accused and deceased; and

(f) the prosecution advocated that the whole story related by the accused on the following days was rehearsed, planned, made consciously, intentionally, and made believable. This suggestion was amplified with PW3's observation that the accused was energetic, in a composed state of mind and able to relate the alleged incident.

[52] In rebuttal, the defence gave the following reasons:

(a) DW1's justification for his earlier version is that being a married man and a police officer with the PDRM, this incident without doubt will attract media attention. If the 'truth' of the matter was to be revealed (ie that he

was sleeping with the deceased at the time the crime incident took place) such negative report will render him an infamous reputation. This unacceptable behaviour and professional misconduct will also greatly affect the PDRM, his family and himself, as such placing him in a precarious predicament. Therefore, he had to lie;

(b) further he clarified that when he was giving his statements to PW16, they were in the presence of his wife and his superior officers from the IPK Sabah. Therefore, at the risk of being embarrassed he felt compelled to lie;

(c) this statement is inadmissible and does not amount to a confession by DW1 on the 29 September 2011's incident. However, the defence further submitted that even if the court is satisfied that the explanation given by DW1 on P35 contradicted D1, he made a clearer explanation in D2; and

(d) the defence contended that while there are some minor parts in P35 that were not exactly true, but the part wherein the intruder turned into a homicidal maniac was real. More so, there was no conclusive proof to suggest that it was the accused who had committed the act of killing the deceased. Finally, the defence submitted that the accused's explanations were sufficiently reasonable to clarify the said contradiction.

[53] This court was initially inclined to agree that this seemed like a reasonable motivation for the accused to lie. Yet, on pause, it became clear to me that the accused's need to change his mind as to the 'truth' that has happened on the night of the deceased's death, will be the very reason for the 'infamous reputation' he wanted to avoid in the first place. So, the nagging question that remained is the true intention behind DW1's revised statements in D1 and D2. With the only supposition that comes to mind after the evidentiary facts, the court finds:

(a) after his initial excitement subsided in the aftermath of the crime incident, it finally dawned upon him that to maintain his earlier story, it would be difficult to give rational justification of what had actually happened on that eventful morning;

(b) being an experienced investigation officer, the crux of the cross questions and answers during the investigation by PW16 must have doubled-up in his police-trained mind and jerked him into sudden realisation that the earlier version in entirety is at odds. It might have weighed on him that his reaction to her rescue while not only being unarmed himself, he was also without any police backup, did not depict him as an experienced CID Inspector could eventually sound unbelievable. It is only probable that any police officer in responding to such an emergency call for help to apprehend a crime perpetrator or a probable robber or house-breaker

would have proceeded to the scene not only with his side arm but also with other police detectives, whether together with him or to follow suit immediately after;

(c) with regard to his statement to PW16, his explanation of being pressured could not be the truth because he had repeatedly and consistently related the same version much earlier to PW1, PW4, PW5 and PW8 which makes his elucidation unbelievable;

(d) DW1, being an experienced investigation officer himself, must have thought that he would arrive at the same impression as PW16 on the discrepancies. As such, it is plausible that DW1 felt that the necessity to tell the truth regarding him sleeping with the deceased on the night of the crime incident is unavoidable. Therefore, for the accused to continue steadfastly with his earlier version will only lower his chances of escaping or exposed him to the inevitable. All these must have paraded through his mind thus the need to tell the true version; and

(e) at this stage, I find the accused's story inconsistent and flawed with discrepancies thus portraying behaviour of suspicious nature. Therefore I am in accord with the learned DPP's view and find that the accused cannot be telling the truth in giving his reason for changing his initial version. His only intention was to cover-up his criminal act by distracting the police investigation from finding the truth of the matter.

[54] *Secondly*, the issue of the presence of an intruder during the incident remained in both statements of DW1. Both versions contained allegations of the said intruder breaking-in by forcing open the grill and the sliding door of the house. During police investigation a padlock with its key attached (P3(4)) was found hanging on the iron grill. The police found no other padlocks or any sign of other door or windows in the house been forced open. Therefore, it is plausible that no intruder broke-into the deceased's house and room and who ultimately killed the deceased and injured the accused. Despite these peculiarity, the accused confirmed and maintained that his injuries were caused by the intruder and not self- inflicted as alleged by the prosecution.

[55] In rebuttal the defence argued that the padlock was deliberately placed by DW1 on the grill door hinge. Bearing in mind the injuries sustained by DW1, there should be blood-stains on the padlock and on the key attached to it. Yet, none was found. The defense counsel put forward another supposition that the intruder must have used a master key to unlatch the padlock. However, in his testimonies the accused was adamant that the intruder force-opened the grill door. It stood to reason that no intruder could possibly enter the house without having to force the padlock open or without using a master-key to open the grill door. Objectively, had the intruder used the master-key, which functions to unlatch any padlock likened to our present case, certainly the

master-key would not be left behind to hang on the iron grill door. In the circumstances, I believe there was no intruder present that incident night as alleged by the accused and in my opinion the defence failed in their rebuttal of this issue.

[56] *Thirdly*, amid him scuffling with the intruder, DW1 testified that he saw the deceased running towards the escape route through the opened sliding and grill door. But instead of making her escape, she stopped- short and shouted at the two of them (DW1 and the intruder) 'sudah lah, sudah lah' which ended in her being stabbed to death by the intruder. I find that this piece of evidence adduced by DW1 is a surreal mix of fact and fantasy.

[57] *Fourthly*, the court's detailed scrutiny of the testimonies of the deceased's immediate neighbours, PW9 and PW10, whose house was next door to the deceased. PW10 testified that on 29 September 2011 at about 5am, she was awakened by a-minute-long sound of a woman screaming from her neighbour's house. She immediately woke her mother, PW9, who also heard the said screaming. PW9 stated that on that eventful night, she was awakened by PW10 who told her that she heard a scream which sounded like 'auuw auuw' and told her to listen up. True enough she heard the same. She continued listening but the sound had stopped. Thinking it was nothing, PW9 left her daughter's room to prepare her children for school. At 6am, when PW9 was leaving the house, she saw police vehicles in front of the deceased's house.

[58] Let me now deliberate on the surrounding facts of the deceased's neighbours for better understanding of the situation then: (i) the scene of crime is a unit link terrace houses and PW9 and PW10 were immediate neighbour of the deceased. Their houses are separated only by a wall. The deceased's bedroom window is built on the frontal part of her rented house; and (ii) as always, the beginning of the day ritual starts with the preparation to work and school. The Muslim believers would be already awakened to the ritual of 'Subuh' prayer. Therefore, should any loud scream came from the deceased's house at such hour, it would obviously awaken or call forth the attention of the neighbouring people.

[59] If I may surmise, should there be an intruder on the dawn of the incident as alleged by the accused (DW1), the following would reasonably be expected to happen:

(a) firstly, after their initial shock of the intruders barging into the bedroom, certainly the expected normalcy from both DW1 and the deceased would be that both or either one of them would let out screams for help at the top of their lungs;

(b) taken that DW1 was immediately engaged in scuffling with the intruder, one would still expect the deceased to run quickly straight to open her bedroom window screaming her lungs out for help. Some of the neighbours, if not all, would surely have leapt to her assistance;

(c) yet, these did not happen and the deceased did not take any immediate action to manage the situation as normally expected unless, of course there was no intruder as alleged and the scuffling were actually between the deceased and the accused (DW1);

(d) or otherwise, given such situation, the deceased would reasonably fled straight out of the house and at the same time scream out for help. I believe the deceased would have done just that if DW1 was telling the truth;

(e) failure to do all the above would depict the deceased as dull-witted but there is nothing during the trial to suggest that and therefore the action of the deceased as portrayed by DW1 under such grave situation simply did not prevail common sense;

(f) another perplexing question which pricked my mind is as to the truthfulness of DW1's story:

(i) DW1 could have instantly limped out from the living room with the support of his good leg or just have easily dragged himself out of the house and shouted for help immediately after the assailant ran out of the house;

(ii) or otherwise, he could have made use of his handphone to immediately call the police station or his police detectives;

(iii) there was no need for him to drag himself back to the bedroom to put on his jeans;

(iv) instead, he chose to drive one kilometre away to the Balai Polis, Keningau for assistance; and

(v) I believe (i) and (ii) would be speedier, simpler, and painless.

(g) had he shouted for help then surely the neighbour would be the first to rush to his assistance. Under such dire situation, it is only to be expected from the neighbours to speed up into assisting DW1 and the deceased, and calling for the police and ambulance. Such scenario would be predictable of any reasonable man including the accused but again this did not happen;

(h) he mentioned in his statement exh D1 that after the assailant left, he noticed the deceased still breathing and gasping for life. DW1 was not certain of the deceased's state of survival at that material time. Therefore, the only reasonable inference that came to my mind was that he certainly

did not want the neighbours to know what had happened. DW1 did not want to take any chance for somebody to be beside the deceased at that material time, and risk her declaring that it was actually DW1 who did the deed;

(i) this negative inference against DW1 continues to persist with one other potent fact ie that after the attack, he found three handphones on the mattress, took them and put all three handphones inside his trousers pocket before he left for Balai Polis IPD Keningau. Since he owned only two handphones, the third must be the deceased's. DW1 took the deceased's handphone away simply for the reason that he did not want to take any chances that the deceased, who may still be alive, might get hold of her handphone and make an emergency call while he was driving to IPD Keningau;

(j) another telling tale is his over conscientiousness to ascertain the deceased's situation initially on arriving back at the scene of crime with PW1 and later asking the doctor to attend to the deceased first. These can only lead to the inference that DW1 was actually and anxiously wanting to ascertain the deceased's state of survival either dead or alive;

(k) another significant point is DW1's statements that while he was putting on his jeans after the attack, he noticed his wallet missing from whence he placed it, implying that it was taken by the robber/assailant. His evidence in defence showed, that just before the attack, he placed his wallet in his jeans back pocket and before going to sleep, he removed his jeans and placed it on the edge of the mattress. Looking at the evidence as a whole, it would be unlikely for the assailant to get hold of his wallet. The reason is that the whole fighting commotion he described merely took place in split seconds or minutes. It is then safe to assume that the assailant would have had no time to take the wallet from the accused's jean pocket, being too busy struggling with the him. Therefore, the idea that there was a robber on the morning of the crime incident and to infer the missing wallet as corroborative evidence for DW1 did not hold water;

(l) on the issue of the footprints, the defence asserted that there were numerous footprints found on the floor of the crime scene but no other samples or for that matter any sample of the deceased's footprints were taken to identify other than DW1's foot-print by the Forensic Science team. Though the evidence relating to DW1's footprints was found satisfactory, the defence contended it cannot prove that DW1 was the murderer. Just the same, there was no sketch plan to show the track of footprints or movement at the scene of crime, be it by the accused, the victim or any third person or other occupier of the house. Also, without the sample of the deceased's footprints, there is no possibility to trail the movements of the deceased making it impossible to conclude that the accused was the killer. I find this subject matter become non-issue

because: (a) DW1 in his evidence admitted that he was at the scene of crime on the morning of the incident; and (b) DW1 in his defence never mentioned there was any other person present during the incident except for the assailant. Surely, should there be anyone in the house at that time besides the deceased and the accused, the story of the scuffling ensued and its consequence will be altogether different. Also, I find the absence of other persons at the material time was further strengthened by DW1 himself, who identified the intruder by doing a photo fit of the intruder's face profile which was altogether an unknown person. This therefore, negated the involvement of a third party more so the other two housemates; and

(m) another perturbing facet is found in exh P3 picture 4, 28, 29, 30, 31–36 which made DW1's story farcical. The accused in his defence mentioned that because of his left knee injuries he was unable to walk. To get to his car from the house, he dragged himself with both his hands and good leg for support, with his left injured leg stretched out. The photographs in exh P3 as a whole showed more of trickling of spotted blood stains instead of drag marks of blood stains which indicated that he did not drag himself to his car from the house. To substantiate this theory, PW1's evidence in court would paint a picture that the accused was not wholly incapacitated to walk. PW1 testified that at the police station, the accused rose from his driver's seat and was able to walk. PW1 said that the accused seated himself at the back passenger seat for PW1 to take over the driving while the accused directed him to the scene of crime. This was confirmed by PW5 as well as PW23 who also testified that the wound on the right knee of the accused did not make him utterly unable to walk. The accused would still be able to walk with a limp by using his good leg to support.

[60] *Finally*, the topmost of the above evidence were the strands of hair found on the deceased's body by PW2. PW2 noted one strand of hair on the left side of the body and another on the right hip. There were also two strands of hair on her right hand; one at the back of the hand and the other in between her fingers, and four strands more on the deceased's right thigh. The hairs if belonging to another person would have contacted with the deceased either before or after she died. The right hand of the deceased was in clenched position when PW2 received the deceased's body. PW2 further testified that one strand of the hair was retrieved from between the deceased's fingers. All the bodily specimens taken from the deceased were sealed and marked, and handed to the investigating officer, PW16 without any tampering and no possibilities of mixing with any other specimens unrelated to this case. PW25 testified that he received the exhs for DNA analysis from PW16 which she confirmed by issuing P65. PW25 later prepared her report namely exh P66 and handed it together with the analysed exhibit to P16. As confirmed by the DNA analysis,

the DNA profile developed from the hair K6a (hair strand that was retrieved in between the clenched fingers of the deceased) revealed that it was a mixed profile consistent with being contributed by at least two sources. The source represented by FTA card E4a taken from the accused was consistent as being the major contributor of this mixed profile. The source represented by bloodstained FTA card K1 taken from Kartini Borhan was consistent as being the minor contributor of this mixed profile. The prosecution submitted that there was a struggle between the accused and the deceased prior to her death and the fact that there was no other hair belonging to other person, supported this notion. All the exhibits for this case were kept safely by PW16 in the exhibit store in IPD Keningau including those handed to her by PW19. It is clear all the exhibits of this case were in the safe custody of PW16 all along and there was no evidence to suggest that the exhibits were tampered prior to the fire incident that destroyed the exhibit store in IPD Keningau. Even though all the exhibits for this case were burnt down in the fire incident after this case started, all chemist analysis had already been done and the chemist findings remained the same. Further, photographs were already taken by both chemists as can be seen in P52–P63 by P24 and in P67–P75 by P25. The fire incident was caused by arson as confirmed in P17 thus, it was not within the control of PW16 or PW19.

[61] Our focus here is on the strand of hair found in the deceased's right hand, in between her fingers. The clenched form of the deceased's right hand when PW2 received her was, as the prosecution put it, a tell-tale sign that the deceased, during her struggle with her assailant, had managed to pull his hair. The defence contended that such evidence was caused during the couple's sexual intercourse and in the throes of ecstasy the deceased pulled her sexual partner's hair or in the alternative the deceased caressed the accused's head before they fell asleep. From the given fact in DW1's evidence, there was no mention of him and the deceased having sexual intercourse during the morning before the crime incident except when he stated that the deceased stroked his hair before he fell asleep. I am more inclined to accept the learned DPP's suggestion. Objectively, the hair found in clenched fingers clearly without doubt conjure up the image of the deceased amid struggling managed to pull the attacker's hair during her struggle or prior to her death. Therefore, the story told by the accused that the deceased caressed his hair just before both of them fell asleep on the morning of the crime incident cannot be the truth. The DNA finding of the hair exh 'K6a' which showed a mixed profile contributed by only the accused and the deceased with the majority of the DNA profile established to be of the accused, supports the notion that there were only the two of them at that material time. Thus, with the hair of the accused found in clenched fingers of the deceased, it would be to coin a phrase 'dead man tell tales'. What would be telling here is the manner in which the accused's hair was found, led without doubt to the inference that a struggle had taken place between them. If one were to consider that the evidence was a result

of the deceased stroking the accused's hair before he fell asleep, the hair should be found clinging in the deceased's open palm.

[62] Another final poignant factor to take into consideration to further substantiate this subject-matter, was the evidence of PW7 who was a close friend of the deceased and who befriended her since 2010. She testified in court that she knew of the deceased triangular love affair and she went out together with the deceased and the accused several times. She also knew that the deceased was in relationship with PW12 for almost three years prior to her death. She noticed that as both the deceased and the accused sent SMS to each other more frequently, the deceased saw less and less of PW12. Clearly, from PW7's evidence, the deceased was two-timing both men. PW7 testified that PW12 paid the rent of the room occupied by the deceased at Taman Adika and knew that PW12 had the key to the room. PW12 also serviced the deceased's monthly instalments of her car loan and she also received other financial benefits from him. In confidence the deceased had told PW7 that the accused in his fits of jealousy had the tendency of self-hitting his head against the wall and beat his chest repeatedly. This shows that the accused had a propensity to self-harm in a fit of jealousy therefore the finding made by PW23 of the self-inflicted wound on the accused's injuries would be the preferable truth.

[63] Having deliberated on the above evidence in totality, this case depends entirely upon circumstantial evidence. The principle enucleated from the various given authorities pertaining to circumstantial evidence is that a conviction based on circumstantial evidence was good in law if the cumulative effect of all the evidence leads to an irresistible conclusion that it was the accused who committed the crime with no other reasonably possible explanation. Therefore, in this present case view all the evidence taken together is sufficient to prove that the accused had inflicted the injuries on the deceased and caused her demise beyond reasonable doubt (see *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] 1 MLRA 20; [1982] CLJ 130; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22).

[64] As the duty of the defence is not to prove his innocence, the search for any reasonable doubt shall be conducted in totality at this juncture on the yardstick of maximum evaluation. I am satisfied beyond reasonable doubt that the accused had inflicted the appalling wounds on the body of the deceased ie wounds penetrating the lung and heart, which was caused by violent stabbings with a sharp instrument of a kitchen knife (as described by the accused in his defence) and caused the deceased's demise. Still, this is insufficient to prove that the act of the accused amounted to murder. In *Hashim bin Mat Isa v Public Prosecutor* [1950] 1 MLJ 94; [1950] 1 LNS 23, Willan CJ said as follows:

> A bare killing, without proof of intention or knowledge as required by that section, can never be murder. It is not sufficient for the prosecution to prove merely the

killing, without intention or knowledge as required by that section set out in that definition.

[65] Intention is a matter of inference and the nature of the injuries sustained by the deceased including the number of wounds and the weapon used by the accused, are deemed as indicator or intention possessed by the accused when he inflicted the injury (see *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497; [1999] 4 AMR 4277).

INTENTION/MOTIVE/CONDUCT

[66] The saga of Kartini's murder casts the court with two different version of stories. In the sphere of mens rea it is obvious that the prosecution's case is built only on circumstantial evidence. Thus, the defence asserted that neither was there a direct evidence nor any revealing motive advanced by the prosecution to suggest that there was any unpleasant incident amongst the three characters in the triangular relationship, to provide a nexus to the accused having inflicted injuries to the body of the deceased to cause her death.

[67] The prosecution however contended that the purported triangular love affair between the deceased and the accused on one hand and between the deceased and PW12 on the other, which continued to persist during the life of the deceased, had resulted in the accused being so consumed with jealousy so as to move him to inflict injuries to the deceased to cause her death.

[68] Where the evidence is wholly circumstantial as in the present case, the legal system typically allows motive to be proven based on it to make plausible the accused's reasons for committing a crime. A motive is the cause that induces people to do a certain action.

[69] The question that comes to mind is what exactly was the deceased's intention in causing the injuries to the deceased's body which caused her death. Intention normally could only be inferred from the actions of the accused or one has to comb through the whole evidence adduced to find the cause that moved the accused commit the act of killing the deceased, which is motive. Although motive is not an element of any given crime but it will greatly give assistance to infer positive or negative allegation against the accused.

[70] It is my observation that the cumulative effect of these circumstantial evidences surrounding this present case pertaining to the cataclysmic saga of the triangular love affair between Kartini (deceased) and Ahmad Rizal (accused) with their respective partners; the former's 'sugar-daddy' (PW12) and the latter's then wife, points that the couple (the deceased & the accused) were in a situation more aptly described as a 'Catch-22 situation', which by

definition is a dilemma or difficult circumstance from which there is no escape because of conflicting or dependent conditions.

[71] The loom of their affair between the accused and the deceased began as early as the month of January 2011. The accused admitted that by the month of July 2011, their relationship grew to being on more intimate terms and thereon he has spent his time at the deceased's house more frequently. At the same time, both of them persisted in their involvements with their respective partners.

[72] Their accused's relationship with the deceased hanged on in the manner of DW1 maintaining his loveless marriage with his wife while the latter knew and was angry about his affair with the deceased. Even in this despairing relationship, the accused did not make any attempt to divorce his wife except getting counselling from Jabatan Agama Islam, which was not much of an effort. The same went with the deceased who, despite her relationship with the accused growing more intimate, did not break up with her boyfriend PW12. Throughout her affair with PW12, the deceased was dependant and committed to PW12. She knew PW12 well before she was involved with the accused.

[73] Amid such volatile relationship, DW1 in his evidence asserted that there was no dissatisfaction or jealousy resulted from their involvement with their respective partners. It is also a fact that there was no direct evidence to show that there were any arguments arising between the accused and the deceased during this triangular love affair. The evidence through DW1 showed that they were so in love with one another although neither took any initiative to break up with their respective partners. Plausibly, both of them were waiting for the other to take the first step but until the deceased's unfortunate death it came to nought.

[74] Objectively, it is incomprehensible for any couple to maintain an acceptable relationship under such situation without any altercation especially when they are in love with each other. Given their predicable situation, my honest observation on their affair was that it was conducive to suspicion, jealousy, dissatisfaction and wariness which in combination will be a perfect recipe to ignite an uncontrollable explosion of anger. The consequence would only be a disastrous and tragic ending as it is in this present case. Indeed, the just deliberated triangular love affairs finally succumbed to despair on the dawn of 29 September 2011.

[75] It was the episode on the late night of 28 September 2011 which eventually spurred the motive of killing. In contemplating the set of circumstances on that morning under the sub-titled passage 'Before the

Incident' above, it is probable that the image DW1 painted does not reflect the truth of the matter at issue. Instead, I believe what transpired was that the deceased was not happy with DW1 who came back only at the breaking of dawn. Thus, the deceased awaited his return from the club in exasperation to start an argument. The seed of suspicion, jealousy, and dissatisfaction as described earlier were brewing, and they all set spark to ignite into uncontrollable explosion of rage. The quarrel began and fights ensued between them and in the heat of passion, it led the accused to stab the deceased which unfortunately ended with her death.

[76] Now, looking at the ferocity of the attack upon the deceased as per mentioned in exh P5 at pp 2–3 under the subheading of 'INJURIES' item Nos 1–10. PW2 opined that it was the stab wound on the chest (item No 2) that caused the deceased's death. There should be a lot of internal bleeding, with the blood oozing out but this would have taken some time to lose so much blood. Meanwhile, the deceased would still be able to stand up after the stabbing. The knife was the sharp weapon used and it is probable that when the injuries were inflicted downward, the perpetrator was standing behind the deceased. The stab wound on the chest was sufficient in the cause of nature to cause death. The deceased was about 5' 1" feet (154cm) tall. The left-handed assailant attacked from behind her and based on the cut, the assailant was holding the knife with the blunt facing him, and the sharp point facing the deceased. With PW2's description earlier, the ferocity of the accused's attack was focused on the deceased's chest directed downward cutting the ribs, muscles, left lung, the covering of the heart and penetrated the heart through and through from the top right to the bottom of the heart. There was no chance of survival and these injuries suffered were very horrific. I believe the accused in the heat of passion was spurred to kill her.

[77] I find the accused sworn statement from the dock was nothing more than a mere denial as I find that the narrative a conjecture by him. If one pays careful consideration to DW1's given evidence, his chronicle of the whole incidents betrayed his conduct which was inconsistent with the truth of the matter. I did a detailed reading analysis of the accused's situation as revealed by the accused's evidence and found that the accused had self- tailored his evidence to portray that he as well as the deceased were victims of an attack by a 'robber turned homicidal maniac'. In the whole factual situation of the case I found staggering inconsistence in his story line which questioned its truthfulness. The total conduct of the accused was incongruous with innocence. It was also contrary to the involvement of any third party. In fact, looking at the evidence holistically, the action of the accused as well as the deceased and the assailant, amid only through the accused's evidence, manifested an irresistible inference of his design and misdeed to finish off the deceased. On the facts, the only plausible reason for the accused to have ascribed the death through a third party

was to conceal his own wrongdoing, with hope that in so doing he could perhaps escape incrimination. As such, the above discussion of the circumstantial evidentiary facts as against the defence's case drove me to my finding.

Having devoured the evidences adduced and written submissions produced by the respective parties in the winding up of the most compelling and gripping murder saga of Kartini bt Borhan (deceased) and my outline of the most pertinent existing factors needed to be appraised, I now arrive at my decision.

[78] I am satisfied that the prosecution has proven all the elements of the charge preferred against the accused beyond all reasonable doubt and the defence has failed, on balance of probabilities, to rebut the finding of prima facie case. I therefore find the accused guilty as charged and convict him accordingly. The accused is hereby sentenced to death by hanging to the neck until death.

Accused convicted and sentenced to death.

Reported by Izzat Fauzan